

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH M. HALEY,

Plaintiff-Appellant,

v

NUNDA TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED

January 18, 2005

No. 250082

Cheboygan Circuit Court

LC No. 02-006984-CZ

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

Whitbeck, C.J. (*dissenting*).

I respectfully dissent. By concluding that the word “subscription” in § 3(1)¹ of the Michigan Freedom of Information Act (FOIA)² “implies” or “envisions” an advance payment, the majority grants public bodies the power to impose a fee that is nowhere expressly authorized in the statute. In my view, had the Legislature wished to grant such a power, it would have done so in plain and simple language. It did not. Here, however, the majority, relying on a single sentence in a single definition from a single dictionary, takes it upon itself to do what the Legislature did not do. Nothing in our judicial commissions authorizes us to function in such a fashion. I would therefore reverse and remand.

I. The Subscription Provision

The portion of the FOIA at issue here, §3(1), consists of exactly two sentences:

A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable.³

Rather clearly, there is nothing in these two sentences that refers, directly or indirectly, to a subscription *fee* or to an *advance* payment. On its face, these sentences (1) grant persons the

¹ MCL 15.233(1).

² MCL 15.231 *et seq.*

³ MCL 15.233(1).

right to subscribe to future issuances of regularly issued public records and (2) provide that a subscription shall be valid up to six months and shall be renewable. Section 3(1) says nothing more, and nothing less. Nonetheless, the majority gleans from these words an inherent right to charge a subscription fee in the form of an advance payment. It is, to say the least, surprising that the majority does so without considering in any meaningful way the two sections of the FOIA that actually deal with fees. It is with these provisions that I would begin the analysis of the issue here.

II. The Fee Provisions

A. Search And Copying Fees

The FOIA contains only two provisions that explicitly authorize a public body to charge money for fulfilling a FOIA request. The first is § 4(1),⁴ which provides that “[a] public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of the public record.” This search and copying fee must be limited to “actual mailing costs, and . . . the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information . . .”

While this section authorizes defendant Nunda Township to recoup the actual cost of providing subscriptions, I conclude that it does not authorize Nunda Township to charge a search and copying fee *in advance*. Although I find no fault with the trial court’s finding that the fee Nunda Township requested was reasonable, this Court has made clear that reasonableness is not the appropriate criterion to determine whether a search and copying fee was authorized under the FOIA. In *Tallman v Cheboygan Area Schools*,⁵ this Court explained that a public body

may not establish for itself what to charge, nor may the court exempt defendant from charging in any fashion other than that established by the Legislature. A public body is not at liberty to simply “choose” how much it will charge for records. To permit such action would effectively allow the public body to override the directive of the Legislature. It should be remembered that under the FOIA statute the public body may, but is not *required*, to charge for the copying of public records.

The FOIA clearly provides a method for determining the charge for records. It is incumbent on a public body, if it chooses to exercise its legislatively granted right to charge a fee for providing a copy of a public record, to comply with the legislative directive on how to charge. The statute contemplates only a

⁴ MCL 15.234(1).

⁵ *Tallman v Cheboygan Area Schools*, 183 Mich App 123; 454 NW2d 171 (1990).

reimbursement to the public body for the cost incurred in honoring a given request – nothing more, nothing less.^[6]

Accordingly, I would conclude the trial court erred in concluding that Nunda Township was authorized to require a fee that, although reasonable, was not the actual cost incurred in honoring plaintiff Joseph Haley’s subscription request.

B. Good-Faith Deposits

The second provision that authorizes a public body to charge money for a FOIA request is § 4(2),⁷ which states: “A public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds \$50.00. The deposit shall not exceed ½ of the total fee.” Nunda Township asserts that this good-faith deposit provision authorized them to require Haley to pay a \$25 subscription fee, because the estimated costs of filling Haley’s subscription exceeded \$50. However, this assertion ignores the plain language of § 4(2). It is clear from the record that Nunda Township did not require a *good-faith deposit* from Haley, but rather a *flat fee* that would cover the entire cost of the subscription. Therefore, I conclude that § 4(2), which only authorizes a public body to charge a *deposit*, is simply not applicable.⁸

III. Determining What The Legislature Did

A. The Majority’s Approach

The majority, in somewhat cursory fashion, skips by the actual fee provisions of the FOIA. Rather, it seizes, as did the trial court, upon the definition in *Webster’s New Collegiate Dictionary* of the word “subscription”: “a purchase *by prepayment* for a certain number of issues (as of a periodical).” [Emphasis supplied]. From this definition, the majority concludes that the plain and ordinary meaning of the word “subscription” “implies an advance payment of a sum certain in order to receive the material fee a set period of time.” The majority then reasons that, because the word “subscription” “envision[s] an advance payment, of necessity it cannot require that such payment be the ‘actual cost’ inasmuch as it is impossible to determine in advance what the actual cost will be because the number of pages varies.” After speculating⁹ as to several reasons why the Legislature might have wished to provide for a “subscription option,” the majority then concludes:

⁶ *Id.* at 129-130.

⁷ MCL 15.234(2).

⁸ The question whether a public body *may* require a good-faith deposit for a subscription is not before us on these facts, and I therefore would not decide that question here.

⁹ In passing, I note that courts may not speculate as to the probable intent of the Legislature beyond the language expressed in the statute. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002); *Cherry Growers, Inc v Michigan Processing Apple Growers, Inc*, 240 Mich App 153, 173; 610 NW2d 613 (2000).

But ultimately it is unnecessary to rationalize the Legislature's behavior; it is only necessary to determine what the Legislature did as expressed through the words of the statute itself. And in this case, the statute does not provide for regulation of the price of the subscription option.

In sum, the plain and ordinary meaning of the word "subscription" includes the payment of a flat fee in advance for the right to receive material for a set period of time.

B. Statutory Interpretation

I agree that our task when interpreting a statute is to determine what the Legislature did as expressed through the words of the statute itself. In so doing, our primary goal is to ascertain and give effect to the intent of the Legislature.¹⁰ The first step in determining legislative intent is to review the language of the statute.¹¹ If the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible.¹² However, "when reasonable minds may differ with regard to the meaning of a statute, the courts must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute."¹³ "To the extent possible, each provision of a statute should be given effect, and each should be read to harmonize with all others."¹⁴

C. Interpreting The Word "Subscription"

The majority uses the fact that the Legislature did not define the word "subscription" as a justification for turning to the dictionary for "guidance." However, as noted above, our task in construing the FOIA is to give each provision effect and to harmonize each provision with the others.¹⁵ The majority's logic allows public bodies to do what the Legislature and this Court have stated that they may not do under the FOIA: that is, to demand an arbitrary fee, albeit a reasonable one, that does not reflect the actual cost of producing the records in question.¹⁶ In the absence of any indication in the statutory text that the Legislature intended subscriptions to be treated differently than any other FOIA request with respect to fees, I suggest that this incongruous result is simply not what the Legislature did as expressed through the words of the statute itself.

¹⁰ *Frankenmuth Mut Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

¹¹ *In re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999).

¹² *Id.*

¹³ *Chop v Zielinski*, 244 Mich App 677, 680; 624 NW2d 539 (2001).

¹⁴ *Michigan Basic Prop Ins Ass'n v Ware*, 230 Mich App 44, 49; 583 NW2d 240 (1998).

¹⁵ *Id.*

¹⁶ See MCL 15.234(1); *Tallman*, *supra* at 129-130.

Even if, however, we must resort to dictionary definitions, I note that *Random House Webster's College Dictionary* defines a "subscription" as "the right to receive a periodical . . . for a sum paid." There is nothing in this definition that "implies" or "envisions" an advance payment. I believe this definition is consonant with the FOIA rights of Haley and Nunda Township and with a straightforward reading of the words of the statute itself. Under such a reading, Haley has the right to receive the periodical issuances of the board's minutes and Nunda Township has the right to receive a sum to be collected under the search and copying fee provisions of §4(1). The sum paid, however, must be the actual cost of filling the subscription – "nothing more, nothing less."¹⁷ Therefore, Nunda Township does not have the right to collect an advance fee for its minutes. The Legislature did not grant such a right and I would not imply it from a single sentence in a single dictionary definition.

D. The Majority's Response To The Dissent

The majority responds, briefly, to my dissent in this case and I will do the same. The majority's response basically turns on the question whether the FOIA authorizes a governmental body to collect an advance fee (or, as the majority characterizes it, a "prebilling") in connection with a subscription under § 3(1). Thus, the issue is not whether the advance fee, or "prebilling," is *reasonable*; the question is whether the FOIA *authorizes* such an advance fee. Clearly, Nunda Township does not have the power in its own right to impose such an advance fee; political subdivisions of the state possess only those powers that our constitution or our statutes delegate to them.¹⁸ In accordance with this principle, Michigan courts have held that "[l]ocal units of government may impose only those taxes expressly authorized by state statute,"¹⁹ and the same principle similarly limits a local unit's power to impose fees.²⁰ Moreover, this Court has already determined that a public body "may not establish for itself what to charge" in connection with fees.²¹ I also note that if a public body charges a fee that exceeds the actual cost of its regulatory purpose, that fee is then considered to be a "tax in disguise."²² There is no question, at least in my mind, that the Legislature has not authorized public bodies to levy a tax to pay the costs of complying with the FOIA.

¹⁷ *Tallman, supra* at 130.

¹⁸ See *Saginaw Co v John Sexton Corp*, 232 Mich App 202, 220; 591 NW2d 52 (1998), citing *Mudge v Macomb Co*, 210 Mich App 436, 441; 534 NW2d 539 (1995), rev'd in part on other grounds 458 Mich 87; 580 NW2d 845 (1998).

¹⁹ *Market Place v Ann Arbor*, 134 Mich App 567, 580; 351 NW2d 607 (1984), citing *Berkley v Royal Oak Twp*, 320 Mich 597, 601; 31 NW2d 825 (1948).

²⁰ See OAG, 1973-1974, No 4768, p 23 (April 20, 1973) (concluding that townships did not have the authority to charge their residents a fee for fire protection services). Note that the Legislature has since amended the applicable statute to expressly authorize the collection of fees for this purpose.

²¹ *Tallman, supra* at 129-130.

²² *Gorney v City of Madison Hts*, 211 Mich App 265, 268; 535 NW2d 263 (1995).

The majority's response sums up this problem when it states that "[T]he dissent incorrectly suggests that absent express legislative authorization, prebilling is prohibited." To be absolutely clear, I do not merely "suggest" this proposition. Rather, I proffer it as a controlling principle of law. As set out above, a public body cannot simply invent and then impose a tax or a fee, no matter how reasonable the calculation of that tax or fee might be. Rather, our constitution or our statutes must authorize such a tax or fee. In connection with the ability of public bodies to charge a fee not specifically authorized by statute, adopting the proposition that what is not prohibited is permitted is a raw and unprecedented grant of power to such public bodies.²³

I would reverse and remand.

/s/ William C. Whitbeck

²³ The majority's response also states, again, that by using the term subscriptions, the Legislature "clearly" contemplates charges in advance of sending out the documents. I suggest, again, that this is anything but clear. The majority throughout its opinion relies on a single dictionary definition to reach the conclusion that the word "subscription" implies or envisions an advance payment. Other dictionary definitions do not carry such an implication. I am unwilling to delegate the power of the last word on this important first impression question of law to *Webster's New Collegiate Dictionary*.